No. 40

In the Supreme Court of the United States

October Term, 1960

DAVID D. BECK,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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Addendum to Statement of Facts

The question concerning the application of the Fourteenth Amendment of the United States Constitution to the Grand Jury proceedings, and the challenge to the proceedings on these grounds, was raised by petitioner's Motion to Dismiss (Tr. 97). This Motion was denied (Tr. 121).

The application of the Fourteenth Amendment of the United States Constitution and its application to petitioner's Motion for Continuance and Motion for Change of Venue was raised by motion (Tr. 16) and also by challenge to the jury panel (Statement 2341). These motions were denied at Transcript pages 37 and 39 and at Statement page 14.

The constitutionality of these rulings was preserved in the Supreme Court of the State of Washington (Assignment of Errors No. 29 and Petition for Rearguments).

The question concerning the constitutionality under the Fourteenth Amendment of the Constitution of the United States of an affirmance of a conviction by a divided court in the State of Washington was raised in the Petition for Reargument and argument was granted upon the ground that this question involved a constitutional right (Appendix to this Petition, p. 63). The Petition was denied (Appendix to this Petition, p. 64).

The Conclusion of the Petition (p. 45) constitutes a summary of petitioner's argument.

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I—OPINIONS BELOW

The opinions of the Supreme Court of the State of Washington are reported in the official Advance Sheets of the Washington Reports at 155 Wash. Dec. 565.[1]

A *per curiam* statement prefaces the opinions of individual judges. The *per curiam* statement reads as follows:

> "One of the judges of this court disqualified himself from participating in the decision of

1. The opinions are not reported in the bound volumes of the Washington Reports or Pacific Reports. Extra copies of the Advance Sheet volume which contains the opinions are in the appendix.

this case. The eight remaining judges, after numerous conferences, are equally divided in their decision for the reasons appearing in the opinions filed."

"There being no majority for affirmance or reversal, the judgment of the trial court stands affirmed."

Three opinions follow the above statement. The first opinion (155 Wash. Dec. 565) represents the decision of four of the eight judges who considered the appeal. This opinion concludes with the statement:

"We find ample evidence to sustain the verdict and no prejudicial error in the record. The judgment appealed from is affirmed."

The second opinion represents the view of the four remaining judges. This opinion concludes as follows (155 Wash. Dec. 620):

"For the reasons stated herein, it is my opinion that the order of the superior court denying appellant's motion to set aside and dismiss the indictment should be reversed and the cause remanded with directions to grant the motion."

One of the latter judges also wrote a separate opinion which reads in part as follows (155 Wash. Dec. 616):

"In the instant case, it was not determined that the members of the grand jury were free from bias and prejudice. This is particularly significant in view of the atmosphere that existed towards the appellant in King County at the time the grand jury was empanelled.

* * *

"The grand jury proceedings should be vacated and set aside."

Following announcement of the above opinions, the petitioner filed a motion for a rehearing.[2] One of the principal grounds urged in the petition was that the Constitution and laws of the State of Washington do not permit affirmance by an equally divided court of a conviction in a criminal case. The Supreme Court thereupon granted a rehearing[3] on the grounds that the petition for rehearing raised a constitutional question which had not theretofore been considered (i.e., the question concerning the validity of affirmance by an equally divided court). Upon the rehearing, after two oral arguments, the court remained equally divided.[4]

A second petition for a rehearing and a motion to strike was then filed upon the grounds, *inter alia*, that the court had not decided the constitutional question concerning the validity of an affirmance of a conviction by an equally divided court.[5] This petition was denied and the motion to strike was stricken by an order entered on August 22, 1960. This order did not indicate any change in opinion on the part of any of the judges. The order of this date is designated in the transcript of the record in the Supreme Court as the "judgment" in the case.[6]

No opinion or order filed by the Supreme Court

2. Transcript of proceedings in the Supreme Court, entry of May 23, 1960. This order is reproduced in the Appendix to this petition, p. 63.

3. Transcript of proceedings in the Supreme Court, entry of May 23, 1960. App. p. 63.

4. Transcript of proceedings in the Supreme Court, entry of June 14, 1960. App. p. 64.

5. Transcript of proceedings in the Supreme Court, entry of July 13, 1960. App. p. 65.

6. Transcript of proceedings in the Supreme Court, entry of August 22, 1960. App. p. 65.

of the State of Washington discusses or considers the validity, under the Constitution and laws of the State of Washington, of a purported affirmance by an equally divided court of a conviction in a criminal case.

II—JURISDICTION

The opinions of the Supreme Court of the State of Washington which are sought to be reviewed were filed on February 3, 1960 (155 Wash. Dec. 565). The judgment was entered, after reargu-ments, on August 22, 1960.[7] On November 18, 1960 the court granted petition until and including January 19, 1961 as the time for filing the petition for certiorari.

The jurisdiction of this Court is invoked upon the grounds that the proceedings in the courts of the State of Washington involved denial of appellant's right to due process and equal protection of the law under the Fourteenth Amendent to the Constitution of the United States. The jurisdiction of this Court to review the judgment of the Supreme Court of the State of Washington is based upon 28 USCA 1257(3).

III—QUESTIONS PRESENTED

1. Where accusation is by a grand jury indictment, does a person (in this case a member and officer of a labor union who at the time of the grand jury proceedings was the subject of continuous, extensive and intensely prejudicial publicity) have a right under the due process and equal protection

7. Transcript of proceedings in the Supreme Court, entry of August 22, 1960. App. p. 65.

clauses of the Fourteenth Amendment to have the charges and evidence considered by a grand jury which was fair and inpartial or, at least, which was instructed and directed to act fairly and impartially?

The judgment of the Supreme Court of the State of Washington holds that no person has a right to a fair and impartial grand jury.

(a) Where petitioner was a member and officer of a labor union, and where prejudicial and inflammatory charges against him were being widely and intensively disseminated by all news media, did he have a right under the due process and equal protection clauses of the Fourteenth Amendment to have the grand jury impaneled in a manner which would prevent or at least tend to prevent the selection of biased and prejudiced grand jurors?

The judgment of the Supreme Court of the State of Washington holds that neither petitioner nor any other person has this right.

(b) Was it a denial of due process and equal protection as guaranteed by the Fourteenth Amendment for the court, in the course of instructing the grand jury, to make statements of an inflammatory nature, prejudicial to petitioner, including a statement that testimony before a United States Senate Committee had disclosed that officers of the Teamsters Union (including petitioner) " . . . had through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that union—money which had come to the union from the dues of its members . . . ?"

The judgment of the Supreme Court of the

State of Washington holds that a court may properly make such statements with respect to a person under consideration by the grand jury.

(c) Were petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment violated by inflammatory statements of the prosecutors made in secret session of the grand jury, including statements of disbelief of testimony favorable to petitioner, threats of perjury charges against a witness who gave testimony favorable to petitioner, and other statements of an inflammatory nature prejudicial to petitioner?

The judgment of the Supreme Court of the State of Washington holds that such conduct is proper and does not violate the rights guaranteed by the Fourteenth Amendment.

2. Was the petitioner's right to a fair trial, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment, violated where a timely motion for a continuance was denied, although inflammatory and prejudicial statements concerning petitioner had been widely and intensively disseminated in the press and in national magazines, and through the media of radio and television, commencing prior to the indictment of petitioner and continuing until the date of trial?

The judgment of the Supreme Court of the State of Washington holds that denial of the motion under such circumstances does not violate the rights guaranteed by the Fourteenth Amendment.

3. Was the petitioner's right to a fair trial, as guaranteed by the due process clause of the Four-

teenth Amendment, violated where a seasonable application for a change of venue was denied, although inflammatory and prejudicial statements concerning petitioner had been widely and intensively disseminated in the press and in national magazines, and through the media of radio and television, commencing prior to the indictment of petitioner and continuing until the date of trial?

The judgment of the Supreme Court of the State of Washington holds that denial of the motion under such circumstances does not violate rights guaranteed by the Fourteenth Amendment.

4. Were the petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment violated by a purported affirmance, by the Supreme Court of the State of Washington, of a judgment of conviction in a criminal case where the Supreme Court was equally divided, and where the Constitution of the State of Washington provides that there shall be a right of appeal in all cases, and where the Constitution and statutes of the State of Washington and the rules of the Supreme Court of that State provide that the concurrence of a majority of the judges present at the argument shall be necessary to pronounce a decision, and where, until petitioner's case, there has been no rule or practice in criminal cases permitting or resulting in decisions other than by decision of a majority of the judges?

This question was submitted to the Supreme Court of the State of Washington by timely petition for rehearing and reargument; but the Court has written no opinion with respect

thereto except to deny the petition, although the Court remains evenly divided.[8]

IV—STATUTES INVOLVED

Amendment XIV, § 1, of the Constitution of the United States provides in part as follows:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 10.28.030 of the Revised Code of Washington provides that a grand juror may be challenged:

> " . . . when, in the opinion of the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice."

Article IV, § 16 of the Washington State Constitution provides:

> "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Section 10.28.070 of the Revised Code of Washington provides:

> "The prosecuting attorney shall attend on the grand jury for the purpose of examing witnesses and giving them such advice as they may ask."

Section 10.40.070 of the Revised Code of Washington provides:

> "The motion to set aside the indictment can be made by the defendant on one or more of the following grounds, and must be sustained

8. Transcript of proceedings in the Supreme Court, entries of June 14, 1960 and August 22, 1960. App. p. 64.

> . . . (4) that the grand jury were not selected, drawn, summoned, empanelled, or sworn as prescribed by law . . . "

Article I, § 22 (Amendment 10) of the Washington State Constitution provides:

> "In criminal prosecutions the accused shall have . . . the right to appeal in all cases;"

Article IV, §2 of the Washington State Constitution provides:

> "The Supreme Court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision. . . . In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated. The legislature may increase the number of judges of the Supreme Court from time to time and may provide for separate departments of said court."

R.C.W. 2.04.070 provides:

> "The Supreme Court, from and after February 26, 1909, shall consist of nine judges."

Rule 6 of Rules Peculiar to the Business of the Supreme Court provides:

> "The court is divided into two departments, denominated respectively, Department One and Department Two . . .
>
> * * *
>
> "The presence of four judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of four judges shall be necessary to pronounce a decision in each department."

R.C.W. 2.04.170 provides as follows:

> "The Chief Justice, or any four judges, may convene the court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision in the court *en banc*: Provided that if five of the judges so present do not concur in a decision, then reargument shall be ordered and all judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court *en banc* shall be final except in cases in which no previous decision has been rendered in one of the departments, and in such cases the decision of the court *en banc* shall become final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such a period shall have the effect of suspending the decision until disposed of by the concurrence of five judges; . . . "

Rule 15 of the Rules Peculiar to the Business of the Supreme Court provides:

> "The Chief Justice, or any four judges, may convene court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision of the court *en banc*: Provided, that if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court

whether rendered *en banc* or by a department shall be final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges; . . . "

V—STATEMENT OF THE CASE

In accordance with the practice applicable in the State of Washington, the pre-trial motions, affidavits and exhibits, as well as the trial proceedings, are included in the "Statement of Facts." References to all documents and proceedings included therein will be indicated by the abbreviation "St.". Documents contained in the transcript of the record will be referred to by the abbreviation "Tr."

On July 12, 1957, petitioner was indicted by a Grand Jury in the County of King, State of Washington, for larceny of $1900.00. This sum was alleged to have been the proceeds of the sale of an automobile which was the property of an association of labor unions known as the Western Conference of Teamsters (Tr. 1).

The Grand Jury which returned the indictment was convened on May 20, 1957 (St. 1704). Prior thereto, on or about February 26, 1957, an United States Senate Committee (commonly known as the "McClellan Committee") had commenced an investigation of certain labor unions and labor union officials.[9] Most of the hearings of the Committee

9. The hearings are contained in several volumes entitled HEARINGS BEFORE THE SELECT COMMITTEE ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, printed by the United States Government Printing office. The printed reports of the proceedings of the Committee will be referred to herein as "Hearings", and the volume and page number will be designated.

were conducted in public and were extensively reported by all forms of news media (St. 2126). During the hearings, petitioner was repeatedly charged by members of the Committee with crimes and other misconduct. The Seattle area (which comprises King County) was a focal point for the dissemination of publicity concerning these charges and other publicity of a highly derogatory and accusatory nature. The so-called disclosures and "findings" which were made during these hearings were featured in both of the newspapers published in Seattle; and sensational characterizations of the testimony and comments of members of the Committee were flamboyantly displayed in large type, frequently in banner headlines (St. 1968; App. 72). The two Seattle newspapers together have a circulation of approximately 313,000; and in addition to the normal circulation, copies of these newspapers are regularly displayed throughout Seattle in a prominent manner so that the general public may observe and read the large type headlines. During the hearings, it was observed that many persons paused to read the accusatory headlines concerning the petitioner and were heard to make remarks indicating that they accepted such accusations and reports as being true (St. 1968).

Proceedings of the Committee were also televised and broadcast direct and "live"; and the more sensational comments or testimony concerning petitioner were reported on the daily (and sometimes hourly) radio and television newscasts.

Similar reports were contained in magazines having national circulation, including TIME, LIFE, LOOK, NEWSWEEK, and U. S. NEWS AND WORLD REPORT (St. 1969; App. 96-105).

In addition thereto, there was published, within a week prior to the return of the indictment, an article in the July 6, 1957 issue of SATURDAY EVENING POST, entitled "The Unknown Sleuth Who Trapped Dave Beck" (St. 2055). This article likewise contained accusatory and derogatory statements concerning petitioner (St. 2056-2059).

On March 26th and 27th, 1957, and on May 8, 1957, petitioner appeared as a witness before the Committee. On both occasions he promptly informed the Committee that, upon advice of his counsel, he would assert the privilege against self-incrimination with respect to the matters which were the subject of the investigation. Nevertheless, the Committee repeatedly posed questions to petitioner which petitioner refused to answer, asserting in each instance his privilege against self-incrimination. The Committee permitted this interrogation to be televised and broadcast by television and radio networks throughout the United States; and these broadcasts and telecasts were heard and observed by large portions of the population in King County (St. 2130). A Seattle television station advertised and announced that it would carry a "live" report of the proceedings on the second day of petitioner's appearance, and the announcement indicated that the station would devote approximately 9 and ¾ hours of its telecasts for that day to reproductions of the hearings and to news comments relating thereto (St. 1986).

During petitioner's appearances before the Committee, petitioner was severely criticized by members of the committee for invoking the Fifth Amendment and his right to do so was challenged (St. 2133). Some members of the Committee ac-

tually asserted during the public hearings that the claim of privilege under the Fifth Amendment constituted an admission of guilt (Vol. 5, Hearings, p. 1537, 1548)."[10]

The purpose of the Senate Committee with respect to petitioner was demonstrated at the time of petitioner's appearance on March 27, 1957. The Chairman then stated (Hearings, Vol. V, p. 1678):

> "We have a witness here that is refusing to answer, and who is hiding behind the Fifth Amendment. The only reason I have continued is to let the country know, let the Teamsters of this country know, the character of transactions that have transpired, about which this witness is unwilling to make disclosures under oath. For that reason, I have indulged the interrogation to this point."

Announcement of the proposed impanelment of a Grand Jury to investigate petitioner was made on April 26, 1957. On May 3, 1957, it was reported that the Prosecuting Attorney had designated a former Mayor of Seattle and a vice-president of the Seattle Bar Association to act as special Prosecutors in the conduct of the Grand Jury proceedings (St. 2005, 2006). This article contained the following statement:

> "The Grand Jury is to investigate possible misuse of Teamsters Union funds by international president Dave Beck . . ."

The Grand Jury was impanelled on May 20, 1957. Between sessions, all of the aforesaid news media were available to the Grand Jurors. During the

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10. Neither the Committee Counsel nor the Committee Chairman corrected these inaccurate assertions. Compare the decision of this Court in *Grunewald v. U. S.* 353 U. S. 391, 421.

month of April, and continuing until the return of the indictment on July 12, 1957, reports were circulated by news media with the degree of intensity described above, charging that petitioner;

had illegally obtained profits from a widow's trust fund;

was possibly connected with mail fraud;

had misused his Union position in 52 instances (including instances of misappropriation of funds);

had invoked the Fifth Amendment 60 times;

had stolen $300,000.00 from the Union, and "took" $300,000.00 from the Union;

had been guilty of "rascality";

had committed "many criminal actions";

had used Union funds for the payment of personal bills;

had been indicted by a Federal grand jury for tax evasion.

Most of these reports attributed the charges to the Chairman of the aforesaid Senate Committee (St. 1977-2112; 2122-2124; 2217-2248; 2278-2339; 2347-2359).

The above references are but illustrative of the many prejudicial reports concerning petitioner. It would be impractical to include all such reports in the record to this court. Additional illustrations are contained in the Appendix hereto.

The opinion of Robert F. Kennedy, Chief Counsel for the Committee, concerning the probable effect of the hearings upon the reputation of petitioner is demonstrated in Mr. Kennedy's book "THE EN-

EMY WITHIN."[11] At page 29 Mr. Kennedy states that when petitioner appeared before the Committee:

> ". . . I looked at him, and realized that here was a major public figure about to be utterly and completely destroyed before our eyes. I knew the evidence we had uncovered would be overwhelming. It would make him an object of disgust and ridicule. I knew from what we had and from my conference with him in New York that he would have no choice but to plead the Fifth Amendment against self-incrimination. It was no contest now. He couldn't or wouldn't fight back."

And at page 35, Mr. Kennedy states that at the time of petitioner's appearance before the Committee on May 16, 1957:

> "He was a different man from the Dave Beck I had seen at the Waldorf on January 5, or before the Committee on March 26. Now he was dead, although still standing. All that was needed was someone to push him over and make him lie down as dead men should."

The effect of the publicity relating to petitioner is shown by the nature of the news reports. On March 29, 1957 the Seattle Post-Intelligencer reported that Beck was hanged and burned in effigy in Yakima, Washington (St. 1992), and the April 8, 1957 issue of TIME Magazine reproduced a picture of this incident (St. 1995). On April 12, 1957 U. S. NEWS & WORLD REPORT reported that petitioner's standing in Seattle had been "badly hurt" in an article entitled "How Dave Beck Rates Now in His Home Town" (St. 2001). On May 27, 1957 TIME Magazine published an article under the

11. Harper & Brothers, Copyright 1960, Robert F. Kennedy.

caption "A City Ashamed" (St. 2043; App. 103). Both Seattle newspapers on May 18, 1957 prominently reported a derogatory criticism of petitioner by the Episcopal Bishop of the Diocese of Olympia (St. 2030-2031).

One of the judges of the Supreme Court of the State of Washington stated that (155 Wash. Dec. 601, 602):

> "The amount, intensity, and derogatory nature of the publicity received by [petitioner] during this period is without precedent in the State of Washington.
>
> * * *
>
> "The natural effect of this publicity was that, in the eyes of the average citizen, the character of appellant had been thoroughly discredited in the Seattle area on or before May 20, 1957.
>
> "In view of the circumstances shown by the undisputed facts stated in the affidavits in this case, I think it would be unrealistic to believe that a very substantial number of the citizens of the community had not adopted, consciously or unconsciously, an attitude of bias and prejudice toward appellant at the time the grand jury was convened. If ever there was a case which required the most stringent observance of every safeguard known to the law to protect a citizen against bias and prejudice, this was it."

It was against this background that the grand jury was convened.

In selecting the grand jurors, no prospective member was asked whether he had read anything about the alleged misconduct of petitioner as reported in connection with the hearings of the Senate Committee or as elsewhere reported. No juror

was asked if he had heard on the radio or seen on television any part of the Senate Committee hearings. There was no interrogation of the jurors to ascertain whether any of them had heard or participated in any discussions concerning such matters.

In one of the opinions of the Supreme Court of the State of Washington, it was stated (155 Wash. Dec. 605):

> "In view of the unprecedented publicity which had been given to the Senate Committee hearings within the three months preceding the impanelment of the grand jury, I think that the jurors should have been interrogated for the existence of possible bias and prejudice against the officers of the teamsters' union."

After the grand jury was selected and the impanelment completed, the court explained and commented on the fact that the institution had been used so infrequently in the State of Washington that most people, even lawyers, were unfamiliar with its procedure and purposes (St. 2172). The court then addressed the grand jury as follows (St. 2175-2176):

> "We come now to the purpose of this grand jury and the reasons which the judges of this court thought sufficient to justify the expense to the county, and the inconvenience to and sacrifice by you, which this grand jury session will require.
>
> "It seems unnecessary to review the recent testimony before a Senate Investigating Committee except to say that disclosures have been made indicating that officers of the Teamsters union have, through trick and device, embezzled or stolen hundreds of thousands of dol-

lars of the funds of that union—money which had come to the union from the dues of its members. It has been alleged that many of these transactions, through which the money was siphoned out of the union treasury, occurred in King County. Such crimes, if committed, cannot be punished under Federal law, or under any law other than that of the State of Washington, and prosecution must take place in King County. The necessary criminal charges can only be brought in this county upon indictment by the grand jury or information filed by the prosecuting attorney.

"The president of the Teamsters Union has publicly declared that the money he received from the union was a loan which he has repaid. This presents a question of fact, the truth of which is for you to ascertain."

* * *

"To completely investigate all of these items may be beyond the energy and endurance of yourselves, the prosecutors and investigating staff. The financial burden of such a complete investigation may be beyond the resources of King County. I urge you to do all that you can within practical limitations to ascertain the truth or falsity of these charges."

The court failed to instruct the grand jury to disregard the then current hostile publicity directed toward petitioner, nor was the grand jury admonished to consider the evidence presented to it in a fair and impartial manner and without bias or prejudice toward petitioner. But on the very afternoon of the day that the grand jury was selected and sworn, the following articles appeared in THE SEATTLE TIMES (St. 2035, 2438);

"BECK OUSTED FROM A.F.L.-C.I.O. POSTS —TEAMSTER CHIEF FOUND GUILTY OF 'VIOLATING TRUST.'"

"SOLON DENIES INFRINGING BECK'S RIGHTS."

"May I say that the committee has not convicted Mr. Beck of any crime, although it is my belief that he has committed many criminal offenses."

And on the following morning, the SEATTLE POST-INTELLIGENCER displayed the following banner headline:

"McCLELLAN LAYS 'MANY CRIMINAL' ACTS TO BECK."

Prior to the trial appellant moved for right to inspect the grand jury proceedings, contending among other things that the attorneys who appeared before the grand jury had engaged in misconduct. This motion was denied (Tr. 121). The court, however, caused the testimony of two witnesses to be sealed and included in the record and after the trial, the testimony of these two witnesses was made available to appellant.

Excerpts from the testimony of one of these witnesses is contained in the opinions of the Supreme Court of the State of Washington at 155 Wash. Dec. 620.

One of these witnesses was a bookkeeper in the employ of the Teamsters Union. He testified before the grand jury that petitioner had delivered to him certain funds for deposit in the safe deposit box at the Teamsters building. The witness testi-

fied that petitioner mentioned something about automobiles and directed him to hold the money until such time as it was possible to determine how the money was to be allocated (St. 1798-1799, 1858). The witness also testified that he was the only person who had a key to this safe deposit box (St. 1802-1803). The witness further testified that over a period of time petitioner had delivered between $5,000 and $6,000 to him in envelopes for deposit in the box. Some of the envelopes had the words "Western Conference" written on them (St. 1805).

During a recess in his interrogation, the witness, at the request of the grand jury (accompanied by one of the special prosecuting attorneys), went to the Teamsters building and returned with two envelopes (St. 1811). Upon one of the envelopes was written the words "Western Conference or J. C." The initials "J. C." refer to the Joint Council of Teamsters (St. 1811). These words were written in the handwriting of petitioner (St. 1812).

Immediately upon the delivery of these envelopes, which he had obtained at the request of the grand jury and in the company of one of the prosecuting attorneys and without prior notice, the witness was subjected to that portion of the grand jury testimony commencing at page 106 of the Appendix.

Excerpts from the testimony of a second witness who testified to facts favorable to petitioner are also contained in the Appendix, commencing at page 110.

These excerpts from the testimony before the grand jury demonstrate such surprising and unus-

ual conduct on the part of a prosecutor in grand jury proceedings that we respectfully request they be examined.

A motion to dismiss the indictment because of the method used in the selection and impanelment of the grand jury, the instructions and comments addressed to the grand jury by the Court, and the conduct of the Prosecuting Attorneys in the secret grand jury sessions, was denied (Tr. 97 St. 2430-2258). The motion was based upon Section 10.40.070 of the Revised Code of Washington (supra p. 8). In denying this motion, the Court observed that the witnesses before the grand jury had not changed their testimony because of the threats and comments of the Prosecuting Attorneys; but the Court apparently did not consider the probable effect of such conduct upon the grand jurors in their consideration of the credibility of the witnesses (St. 2526, 2530, 2210).

Prejudicial Publicity Relating to Petitioner Subsequent to Return of the Indictment

Continuously from the date of the indictment until the date of trial, publicity of the nature heretofore described, relating specifically to petitioner and to officers of the Teamsters Union, including petitioner's son and other persons known to be his associates, was disseminated throughout King County (St. 1967-2124, 2217-2248, 2278-2340; App. 96-110). This publicity included flamboyant and sensational accounts of the trial of petitioner's son, who was charged and convicted of an offense similar to the charge against petitioner (St. 2337-2340; App. 105). The trial of petitioner's son lasted approximately ten days and was concluded approxi-

mately ten days prior to the commencement of the trial of petitioner, St. 2337, 1). The jurors in petitioner's case were selected from the same panel from which the jurors in the case against petitioner's son were selected (St. 2266-2361).

Motions for Continuance and Change of Venue

After the return of the indictment on June 12, 1957, petitioner made repeated motions for a continuance of the trial date on the grounds that the inflamatory publicity concerning petitioner and members of his union had created an atmosphere in which it was impossible for petitioner to obtain a fair trial (Tr. 16, 123, 128, St. 1-15). A motion for a change of venue was made on the same grounds (Tr. 29). These motions were supported by extensive affidavits describing the nature and intensity of the then current publicity; and it was averred, without denial, that counsel for petitioner had discussed the matter with approximately fifty attorneys in the Seattle area, all of whom expressed the opinion that it would be impossible for petitioner to obtain a fair trial under such circumstances (St. 1951-1966, 2214-2216, 2250-2276). Except for a short continuance for the convenience of counsel (St. 2272), all such motions were denied and petitioner's trial commenced on December 2, 1957 (St. 15).

VI—THE TRIAL

The trial in this case commenced on December 2, 1957. The State introduced evidence showing that a certain automobile owned by the Western Conference of Teamsters had been used from time to time

by petitioner and other officers of the Teamsters Union (St. 438-443, 472); that in January 1956 the automobile was left at a Seattle garage for the purpose of being sold; that a certain Martin Duffy determined to purchase the car (St. 444-474); that Duffy assumed that the automobile belonged to petitioner, although no one told him so, and because of this assumption made his check for the purchase price ($1900.00) payable to petitioner (St. 488-490); that Duffy delivered the check to petitioner's secretary (St. 481); that petitioner's secretary made a telephone call to someone in the Teamster's building and that a bookkeeper then came to petitioner's office and delivered an envelope containing the certificate of title to petitioner's secretary, who in turn delivered the envelope to Duffy (St. 475-497); that the sale transaction in no way involved any negotiation between Duffy and petitioner and that petitioner was in fact out of the city at the time of the negotiations for the sale of the automobile and receipt of the funds (St. 488-490); that petitioner's secretary, without instructions from petitioner, deposited the check to petitioner's personal account because of the fact that it was made payable to petitioner (St. 1020).

One of the prosecutors who assisted in the conduct of the Grand Jury was called as a witness for the State. He testified that petitioner had appeared before the Grand Jury and had there testified that upon his return to Seattle and upon learning of the transaction he repaid the union (St. 639-640). This testimony was corroborated in the Grand Jury proceedings by a bookkeeper of the Teamsters Union whose testimony was made available to petitioner after the trial (St. 1797-1944). This witness was

not called by petitioner at the trial because petitioner had been advised that he had been subjected to misconduct in the Grand Jury room and petitioner's counsel were uncertain as to the effect of such misconduct on the testimony of the witness; and in addition thereto, in the course of the trial of petitioner's son the prosecutor had asserted in open court that this witness was evading service of a subpoena (which was never shown to be a fact) and that he, the prosecutor, would not vouch for the credibility of the witness (St. 2304-2307). These charges by the prosecutor were reported prominently in the press (St. 2304-2307, 2314).

Petitioner introduced evidence showing that there was maintained at the Teamsters building a safe deposit box and that prior to the indictment of petitioner the box contained a large amount of currency (St. 590, 1064-1066). Petitioner also introduced evidence showing that petitioner frequently made contributions to political candidates in currency (St. 590, 592); and in the final argument, petitioner's counsel argued that petitioner, upon returning to Seattle and learning of the mistaken deposit of funds to his account, had returned this sum in currency for the deposit in the safe deposit box and subsequent use for contributions to political campaigns. Petitioner testified in his defense, but gave no testimony concerning receipt of the $1900 or the subsequent disposition thereof (St. 1083-1118).[12]

The principal evidence relied upon by the State to prove the element of knowledge and intent con-

12. If petitioner had contributed to a candidate for a national elective office he would have been guilty of a violation of 18 USC § 610.

sisted of the preliminary work sheets of a certified public accountant employed by petitioner to prepare his income tax returns. These work sheets contained an entry which showed a receipt of $1900 from a "Beck-Callahan" [Cadillac?] transaction. The identifying witness testified that the entry resulted from mis-reading the handwriting on the original ledger sheet (St. 753, 754). (St. 674, 701; Ex. 17, Ex. 18). It was definitely shown that these exhibits were not business records nor had the accountant discussed them with or shown them to petitioner or received any instructions whatsoever from petitioner concerning their preparations (St. 660-664, 667, 732, 734, 736, 964, 965, 1110). These documents were prepared by the accountant by reference to a receipt and disbursement ledger maintained by petitioner's secretary (St. 735, 753, 754; Ex. 22). The latter document which the accountant identified as the instrument from which he compiled the work sheet (St. 735), contained an entry correctly showing the $1,900.00 to have been a receipt relating to an automobile transaction. Petitioner had not seen the latter document and had given his secretary no instructions with reference to its preparation (St. 964, 965, 1110). Neither preparation of these documents nor knowledge of their contents were in any way attributed to petitioner. The trial court, nevertheless, admitted Exhibits 17 and 18 in evidence and the State relied strongly on the erroneous entry, contending that it was proof of petitioner's knowledge and intent, even though the entries had been made by the accountant without the knowledge of petitioner (St. 701, 1317-1319). The theory upon which the State offered and the trial court admitted these docu-

ments was never clear (St. 1444). The Supreme Court of the State of Washington held that their admission did not constitute error, apparently upon the theory that it could be assumed that both the accountant and petitioner's secretary testified falsely, and that such testimony warranted the inference that affirmative authentication of the documents and petitioner's knowledge and responsibility therefor could be drawn (155 Wash. Dec. 584). The opinion of the Supreme Court of the State of Washington on this point does not accurately summarize the testimony which was claimed to constitute the purported authentication of these documents (St. 660-666, 753, 754). Actually, all of the testimony negated any knowledge on the part of petitioner concerning the preparation of these documents. The admissibility of the documents is reminiscent of the proceedings in the trial which is described in Lewis Carroll's ALICE IN WONDERLAND, Chapter XII (App. 112).

The jury returned a verdict of conviction after a trial lasting approximately two weeks (St. 1-1347).

VII—APPELLATE PROCEEDINGS

In accordance with the rules applicable in the State of Washington the conviction of petitioner was appealed to the Supreme Court of that state. The case was first argued in March, 1959, and the first opinions of that court were filed in February of the following year (155 Wash. Dec. 565). Eight judges considered the appeal and were equally divided in their decision; the court nevertheless filed a *per curiam* statement purporting to affirm the conviction. This purported affirmance was in direct

violation of the Constitution and statutes of the State of Washington, and the rules of the Supreme Court of the State of Washington, which provide that the concurrence of a majority of the judges shall be necessary to pronounce a decision. The applicable constitutional and statutory provisions, and the applicable court rules, are set forth hereinabove at pages 8 and 9.

Upon petitions for rehearing and reargument the members of the Supreme Court remained equally divided in their respective opinions on the merits, but a majority of those sitting apparently voted to affirm the conviction despite the lack of a constitutional majority for either party (App. 64).

Prior to one of the reargruments one of the judges who heard the case (and who voted for affirmance) is reported to have stated in a press conference that the case had political implications because of the fact that three of the judges were candidates for re-election in the November 1960 election (Seattle Post-Intelligencer, June 14, 1960).

All constitutional issues raised in this petition were raised at the trial and upon appeal; and in his petition for reargument and rehearing petitioner raised the question of the constitutionality of the purported affirmance of the conviction by a divided court.

VIII—ARGUMENT

A. Appellant's Right to an Impartial and Unbiased Grand Jury

This Court has repeatedly been called upon to consider the accusatory processes employed in state actions and to determine whether grand jury pro-

ceedings and other methods of accusation meet those standards of fairness which are required by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Cassell v. Texas, 339 U.S. 282;
Hernandez v. Texas, 347 U.S. 475;
State v. Pierre, 306 U.S. 354;
Re William Oliver, 333 U.S. 257.

In considering cases of this nature this Court has invariably expressed the view that grand jurors must be fair and impartial, and that the use of methods of selecting grand jurors which result or might result in a biased or prejudiced grand jury requires a dismissal of the indictment. The decisions of the Court on this point have been based upon both the due process of law and equal protection clauses of the Fourteenth Amendment. Annotation, 94 L.Ed. 856, at 857.

Thus, in *Cassell v. Texas,* 339 U.S. 282, this Court reversed a conviction because of discrimination in the selection of the grand jury. The opinion in that case commenced as follows (339 U.S. 282-283):

> "Review was sought in this case to determine whether there had been a violation by Texas of petitioner's federal constitutional right to a fair and impartial Grand Jury."

Similarly, in *State v. Pierre,* 306 U.S. 354, this Court held that the standards of impartiality requisite to service as a trial juror were likewise applicable to Grand Jurors.

The Court has expressed the same philosophy by declaring that the Grand Jury is the institution

which stands between the citizen and the prosecutor. *Hoffman v. United States,* 341 U.S. 479.

The following decisions likewise firmly demonstrate that at common law, as well as under the applicable constitutional provision, Grand Juries must be selected in a manner which will conform to fundamental standards of fairness and result, insofar as possible, in an institution which will act fairly and impartially.

Field's Charge, 30 Fed. Cas. 992, No. 18255 (Cir. Ct. Cal. 1872);

I Wharton on Criminal Law, (7th Ed. 1874) pp. 355, 366, §452;

United States v. Wells, (D.C. Idaho 1908) 163 Fed. 313;

In the case now before the Court petitioner was entitled to a fair and impartial Grand Jury by virtue of the due process clause as well as the equal protection clause. In *Hernandez v. Texas,* 347 U.S. 475, involving an indictment of a person of Mexican descent, this Court stated (347 U.S. 478):

> ". . . community prejudices are not static and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a statement of fact."

In this case the record conclusively establishes that members and officers of the Teamsters Union constituted a class which required the protection of the equal protection clause of the Fourteenth Amendment. Indeed, the court which impaneled the

grand jury referred collectively to the "officers" of the Teamsters Union in his charge (ST 1730).

Until the case against petitioner, there could have been no doubt that the statutes and decisions of Washington required that grand juries must be fair and impartial.[13] Section 10.28.030 of the Revised Code of Washington provides that at the time of impanelment a grand juror may be challenged:

> ". . . when, in the opinion of the Court, a state of mind exists in the juror, such as would render same unable to act impartially and without prejudice."

The petitioner herein, not having been held to answer at the time of impanelment, was unable to exercise his right under the aforesaid statute.

In *State ex rel Murphy v. Superior Court,* 82 Wash. 284, 144 Pac. 32, the Supreme Court of the State of Washington held that it was proper for a judge to excuse certain prospective grand jurors, and in so doing, declared:

> "That it was the policy of the legislature to preserve the right to have an unbiased and unprejudiced jury and grand jury, and that no suspicion should attach to the manner of its selection in all cases, cannot be questioned."

In the later decision of *State v. Guthrie,* 185 Wash. 464, 56 P-2d 160, the Supreme Court of the State of Washington held that a motion to quash an indictment was properly denied, but in so doing, the Court cited the *Murphy* case, supra, with approval and

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13. In fact, in its brief on appeal, the State conceded that grand juries must be fair and impartial. Four judges of the Supreme Court of the State of Washington did not agree with the State on this point.

discussed Section 10.28.030 of the Revised Code of Washington as follows:

> "While this section may be said to relate to challenges made by interested persons, it is not to be construed as denying to the court the right, upon its own motion, to excuse a juror deemed to be disqualified or incompetent. To deny this right would be out of harmony with the policy of the law, which charges the court with the responsibility of insuring that qualified and impartial grand jurors are secured."

In states which have statutory provisions similar to the applicable statutes in the State of Washington, it is held that the institution of the grand jury must be one which acts fairly and impartially. Illustrative cases are:

State v. Johnson (N.D., 1927), 214 N.W. 39;

Maley v. District Court (Iowa, 1936), 266 N.W. 815;

Burns International Detective Agency V. Doyle (Nev., 1922), 208 Pac. 427.

In petitioner's case, the trial court not only failed to adopt methods of impanelment which would insure the selection of fair and impartial grand jurors, but also, in its instructions to the grand jury, made specific references to the "disclosures" made by the Senate Committee indicating that:

> "officers of the Teamster's Union have, through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that Union—money which had come to the Union from the dues of its members . . ." (St. 1730, 1731).

The Court also advised the jury that petitioner had "publicly declared that the money received from the Union was a loan which he has repaid. This presents a question of fact, the truth of which is for you to acsertain." (St. 1730, 1731).

The latter statement was inaccurate and presented to the grand jury a wholly improper issue of fact. Petitioner never contended publicly, nor in his grand jury testimony, nor at the trial, that the $1,900.00 which he was charged to have stolen was a loan.

Such instructions and comments to the grand jury specifically violated the mandate of Article IV, §16 of the Washington State Constitution, which provides (supra, p. 8)

> "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Similarly, the above instructions, together with the Court's references to the expense to be incurred by the County in conducting the grand jury and by the sacrifice by the grand jurors was in violent disregard of the declarations of the Supreme Court of the State of Washington in *State v. Guthrie,* 185 Wash. 464, 56 P. 2d 160, to the effect that the policy of the law:

> ". . . charges the court with the responsibility of insuring that qualified and impartial grand jurors are secured."

Further, it has been the uniform rule that it is error for a court in the impanelment of a grand jury to denounce particular individuals or direct the attention of a grand jury to any named person. The following authorities are illustrative:

Fuller v. State (Miss., 1905), 37 So. 749, 750;
Blake v. State (Okla., 1932), 14 P 2nd 240;
Clair v. State (Neb., 1894), 159 N.W. 118;
State v. Will (Iowa, 1896), 65 N.W. 1010.

In petitioner's case, grand jury witnesses who testified to facts favorable to petitioner were threatened with perjury; and the prosecutors, in the presence of the grand jurors, expressed disbelief in their testimony. This constituted grave misconduct. It was for the jurors, not the prosecutors, to determine the credibility of the witnesses. It is improper for a prosecuting attorney, in the course of grand jury proceedings, to threaten witnesses or to argue issues of evidence. On the contrary, the secrecy which surrounds grand jury proceedings demands that a prosecutor act with the utmost fairness. The prosecutor's duty is simply to present to the grand jury facts sufficient to convince them that there is probable cause for a trial upon the merits. There is no cross-examination of witnesses. The accused has no right to appear. Hearsay evidence is admissible against the accused. Thus, the prosecutor's burden is slight. If in secrecy the prosecutor may threaten witnesses with prosecution and testify as to his own knowledge (when he would be rebuked for such conduct in open court), then grand juries are the vehicle of state oppression rather than protection for the citizen. Whatever excuse there may be for misconduct in a courtroom, there is none in the secrecy of the grand jury room. No person can be safeguarded against the possibility of unfounded accusations where, as here, the prosecuting attorney argues to the grand jury that witnesses who testify to facts favorable to the prospective defendant are committing perjury. Such conduct most

seriously violates the fundamental standards of fairness which have been defined by this Court. This is particularly true of the statement by the prosecutors that "no person in this room" believed the testimony of the witness. The fact is that many of the jurors, in the absence of such comment, might have believed the testimony of the witness, but were persuaded not to do so by the fact that the prosecuting attorneys did not choose to believe this testimony. The prosecuting attorneys, however, were not the persons whose function it was to determine the truth or falsity of the testimony. That function belonged exclusively to the grand jury.

One of the most thorough analyses of the duties of a prosecutor in the conduct of the grand jury proceedings is contained in the cases of *U. S. v. Wells,* (D.C. Idaho 1908) 163 Fed. 313. In that case the court dismissed an indictment because:

> ". . . a commendable zeal which gathered force as it progressed, finally expanded into an exaggerated partisanship wholly inconsistent with the semi-judicial duties of a public prosecutor, and entirely unnecessary to the execution of the power imposed." (p. 329)

In defining the power of the prosecutor before the grand jury, the court declared (p. 327):

> ". . . the provision that the prosecuting attorney may at all times appear before the grand jury for the purpose of giving information or advice relative to a matter cognizable by them, was meant to confine him to those traditional duties of giving advice concerning procedure and the like, to the examination of witnesses, as expressly provided and not to the expression of opinions or the making of arguments."

To the same effect are the following authorities:

4 *Wharton's Criminal Law and Procedure* (1957) §1716, p. 480;

Attorney General v. Pelletier, (Mass., 1922) 134 N.E. 407;

State v. Crowder, (N.C. 1927) 136 S.E. 337;

People v. Bennin, (1946) 61 N.Y.S. 2nd 692.

In this State, commendable zeal does not permit a prosecutor to step beyond reasonable bounds of propriety in the open court room. Intemperate conduct there, even subject to adversary check and instructions of the trial judge, can and has resulted in reversals of convictions. *State v. Case,* 49 Wn. 2d 66, 298 P. 2d 500. The prosecutor is no less a State officer when he enters the secrecy of the grand jury room.

The present record compels the conclusion that actual prejudice infected the grand jury proceedings, or, at the very least, that the situation was so charged with "potential prejudice" that reversal is required. Compare *Hudson v. North Carolina,* 363 U.S. 697. Further, this court has consistently held that the state's available alternative of accusing by information is no answer to a proceeding to set aside a defective indictment; if the state elects to proceed by grand jury, it must do so in a constitutional manner. See *Eubanks v. Louisiana,* 356 U.S. 584.

B. The Denial of Petitioner's Motions for Continuance and Change of Venue

As indicated above, the Senate Committee hearings directly resulted in a series of events which

kept the Committee's charges firmly fixed in the public attention continuously from the spring of 1957 until the time of trial in December, 1957. Following the indictment of petitioner in July, the Committee resumed its public and highly publicized hearings in October, continuing to attack and vilify both petitioner and other officials of the Teamsters Union with whom his name was intimately connected in the public mind. In August he was indicted by a federal grand jury on several counts of tax fraud concerning the same transactions which had been the subject of the Committee proceedings in March and May. In November his son stood trial in Seattle on two counts of grand larceny. The subject matter of that trial, like the present case, concerned the sale of union-owned automobiles. Petitioner's appearance as a witness in his son's behalf provoked further sensational publicity. The conviction of the younger Beck was heralded in the local newspaper with headlines such as "Dave Beck, Jr., Guilty as Thief." The trial of petitioner himself followed a few days later.

It is beyond dispute that the Senate Committee's "exposure" of petitioner and insistence upon forcing him repeatedly to invoke the privilege against self-incrimination before a nation-wide television audience, followed by the indictment in the instant case, the indictment in the tax fraud case, the resumption of the Committee hearings, and the trial of petitioner's son, together comprised the foremost public event in Seattle and the State of Washington in the year 1957. The attendant publicity was at all times intensive and inflammatory. The inevitable result was to infect the entire body of prospective petit jurors with bias and prejudice, whether con-

scious or subconscious, against the petitioner. Under these circumstances, due process and equal protection required the granting to the defendant a change of venue or a reasonable continuance until the public furor against him could have some chance to abate.

It is no answer to this contention to claim that the jurors were bound by their oath to decide the case solely on the evidence. This Court has long recognized that jurors, being human, cannot realistically be counted upon to overcome the effects of prejudicial matter which has been transmitted to them extra-judicially. As Mr. Justice Jackson pointed out, concurring in *Krulewitch v. United States*, 336 U.S. 440, 453:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be an unmitigated fiction . . ."

Mr. Justice Frankfurter has similarly remarked in *Pennekamp v. Florida*, 328 U.S. 331, 357:

> ". . . No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations. However, judges are also human, and we know better that did our forbearers how powerful is the pull of the unconscious and how treacherous the rational process . . ."

Therefore, the rule is that a constitutionally fair and impartial trial cannot be had where there is a highly inflamed public mind. *Moore v. Dempsey*, 261 U.S. 86.

Here, however, the facts are far more aggravated than in the ordinary case of public prejudice. The

panelists from among whom petitioner was obliged to accept a trial jury had been inflamed aginst him not through the private enterprise of the press, but rather through the deliberate (and constitutionally dubious) efforts of a committee of the United States Senate. An examination of the record herein clearly reveals that all of the hostile publicity concerning petitioner stemmed, directly or indirectly, from the McClellan Committee's activities in denouncing him. The case thus falls within the category of those in which courts have condemned the extra-judicial transmission to the public, by an agency of government, of purported information and accusations concerning a prospective criminal defendant. In such a context the published remarks of the prosecutor may constitute a breach of due process. *Shepherd v. Florida,* 341 U.S. 50. Still closer to the instant situation was that involved in *Delaney v. United States* (1 Cir.) 199 F. (2d) 107, where a congressional committee insisted upon holding public hearings concerning one whom they knew to be a prospective criminal defendant. The Court of Appeals ruled that the trial court had denied the defendant due process in refusing him a continuance until the effects of the adverse publicity could have a chance to abate, and stated:

> "It is fair to say that, so far as the modern media of communication could accomplish it, the character of Delaney was pretty thoroughly blackened and discredited as the day approached for his judicial trial on narrowly specified charges . . .
>
> "No doubt the district judge conscientiously did all he could, both in questions he addressed to the jurors at the time of their selection and in cautionary remarks in his charge to the

jury, to minimize the effect of this damaging publicity, and to assure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. But . . . one cannot assume that the average juror is so endowed with a sense of detachment or is so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity . . ."

The identical result is reached where the pre-trial publicity is prompted by the activities of a state crime commission. *United States v. Florio,* 13 F.R.D. 296. Compare also *Basiliko v. State* (Md. 1957), 129 A. (2d) 375. The Supreme Court of the State of Washington itself has earlier recognized the inability of jurors to serve impartially amid an atmosphere of public hostility. *State v. Riley,* 36 Wash. 441, 78 Pac. 1001.

The same considerations apply to petitioner's application for a change of venue. In the instant case the Supreme Court of the State of Washington summarily abandoned its prior rule that when an uncontroverted affidavit of local prejudice is filed (St. 1968-1976, 2114) a change of venue is required. See *State v. Hillman,* 42 Wash. 615, 85 Pac. 63.

Of course, it is not merely the defendant, but the judicial system itself, which suffers when excessive publicity precludes a fair trial. The only practical remedy is the granting of changes of venue, continuances, or new trials. See Mr. Justice Douglas, *The Public Trial and the Free Press,* 46 A.B.A.J. 840 (August 1960).

It is not contended that the public hostility against petitioner would necessarily have disap-

peared entirely within a matter of weeks. The crux of the matter, rather is that petitioner was entitled under the Fourteenth Amendment to a reasonble postponement or transfer of his trial to a time or place at which the effects of the massive, government-engendered publicity against him would have had a fair chance to diminish. The granting of his timely requests for such relief would in no way have injured the State's case; their refusal forced him to trial in a hopelessly biased atmosphere and effectively deprived him of due process of law.

C. The Purported Affirmance of Appellant's Conviction by an Equally Divided Court

Article I, §22 (Amendment 10) of the Constitution of the State of Washington provides:

"In criminal prosecutions the accused shall have . . . the right to appeal in all cases; . . ."

Thus, in Washington, a criminal defendant is afforded the constitutional right to have his case heard and determined by the Supreme Court, which is the sole appellate court in the State.

Article IV, §2 of the State Constitution provides:

> "The Supreme Court shall consist of five judges, a majority of whom shall be necessary to form a quoroum and *pronounce a decision.*" [Emphasis added.]

The number of judges on the Court was increased to nine by a statute now codified as RCW 2.04.070.

The statute governing hearings *en banc,* RCW 2.04.170, provides:

> ". . . The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision in the Court *en banc:* Provided that if five of the judges so present do not concur in a decision,

then reargument shall be ordered and all judges qualified to sit in the cause shall hear the argument. *but to render a decision a concurrenceof five judges shall be necessary . . .*" [Emphasis added.]

The clear meaning of the foregoing provisions is that the State has adopted a constitutional and statutory appellate system in which every criminal defendant possesses the right to appeal, and in which the State Supreme Court is empowered to render a decision, in an *en banc* hearing, only upon the concurrence of five or more of the judges. In the case of this petitioner, that system has been abandoned. The eight judges participating divided four to four on the merits in the first opinions published. Reargument was then ordered in compliance with the statute and two further oral arguments were conducted. Following these the court entered its order adopting the original per curiam opinion which had purported to affirm the conviction while announcing that the court was evenly divided. No opinion was filed which discussed or considered the validity of the purported affirmance by an equally divided court, and at all times the court has remained equally divided on the merits of the controversy.

It is the position of petitioner that the State Supreme Court's attempt to affirm his conviction in an *en banc* proceeding, without the required concurrence of at least five judges, violates his right to equal protection of the laws under the Fourteenth Amendment. The meaning of the foregoing constitutional and statutory provisions is clear and unambiguous; to exempt petitioner from their application is to deprive him unconstitutionally of the rights which have been afforded to all those similarly

situated in the jurisdiction. It may well be that the state could properly establish a system of criminal appeals which would provide for affirmances by an equally divided court. The fact, however, is that it has not done so, but rather has granted to all persons accused of crimes the right to appeal and the right to a decision on the merits (in *en banc* cases) by a concurrence of at least five of the nine judges. Therefore, any common law rule or precedent espousing affirmance by an equally divided court is inapplicable.

The constitutional guarantees of the Fourteenth Amendment apply to all acts of the state, including the acts of its judiciary. See *Carter v. Texas,* 177 U.S. 442. Thus, in those states where a right of appeal exists in a criminal case, that right must be afforded to the defendant in a manner consistent with the methods of appeal which are provided and in accordance with the federal guarantees of equal protection and due process. See *Frank v. Magnum,* 237 U.S. 309; *Dowd v. United States,* 304 U.S. 206; *Kyle v. Wiley,* 78 A. (2d) 769.

A constitutional and statutory system of appeal cannot be arbitrarily applied or ignored as the state courts see fit. It must, rather, be applied in conformity with the plain meaning of its provisions and equally to all appellants. See *Griffin v. Illinois,* 351 U.S. 12; *Eskridge v. Washington State Board,* 357 U.S. 214; *Cole v. Arkansas,* 333 U.S. 196. Under these decisions, where an appellate procedure is established by a state for criminal prosecutions, the procedure must be followed in all cases.

The Supreme Court of the State of Washington has frequently affirmed *civil* judgments by an equally divided court, and has announced that this

practice is not inflexible and that the result in each situation will lie wholly within the discretion of the court. *Serra v. National Bank of Commerce,* 27 Wn. (2d) 277, 178 P. (2d) 303. The practice is one of expediency and is apparently justified by the absence of any constitutional right of appeal in civil litigation. Such a rule of discretion would clearly be unconstitutional in criminal cases, where a defendant does possess a constitutional right of appeal and where the court is not free to discriminate at will among individual appellants. In only one prior case, *State v. Alfred,* 145 Wash. 696, 260 P. 1073, has the Washington court purported to affirm a criminal conviction without a majority. That decision may not be regarded as a precedent, however, since for some undisclosed reason the statutory process of reargument and reconsideration was never pursued or completed. The case of petitioner is thus the first and only criminal case in the jurisdiction in which the court has consciously denied to an accused his statutory and constitutional right to a majority decision.

The judicial council of the State of Washington has recently proposed a constitutional amendment which would solve the problem of an equally divided court in criminal appeals (App. 66). In the meantime, it is manifest that no decision affirming the conviction of petitioner can lawfully be rendered by fewer than five of the eight participating judges. To hold otherwise (as the state court has attempted to do without stating its grounds as required by Article IV, §2 of the State Constitution) is to defy the obvious meaning of the constitution and statutes providing for appellate review in criminal cases, and to deny petitioner equal protection of the laws.

IX—CONCLUSION

In summary, the indictment, trial and appellate proceedings in this case all involved serious and substantial denials of petitioner's right under the Fourteenth Amendment. The grand jury which accused him was convened in an atmosphere of the most extreme public passion and hostility arising directly from the deliberate acts of an agency of the federal government; the trial court and prosecutors at that stage, far from minimizing the necessarily prejudicial effects of such publicity, exacerbated it by their remarks and conduct during the impanelment and the grand jury proceedings; petitioner was thereafter forced to trial under circumstances which manifestly defeated his right to a panel of fair and impartial petit jurors; and on the appeal which followed the State Supreme Court purported to affirm his conviction at the cost of abandoning, for this case only, a clearly established system of appeal which should lawfully apply to all accused persons. The importance of these constitutional issues is such that the case effects not only petitioner but every other citizen of the State of Washington. The requirements of this Court for Certiorari have been met, and it is respectfully urged that the Writ should be granted.

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